IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

ORDER

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S.B. Civil Revision Petition No. 22/2006

Sobhag Narain Mathur

Versus

Sudarshan Lal & Anr.

Date of order :: August 14, 2007

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. Piyush Nag for the petitioner
Mr. Mahendra Goyal for the respondent No. 1

BY THE COURT:

1. This revision petition is directed against the order dated 13.02.2006 passed by the learned Additional District Judge No. 2, Ajmer, whereby the learned appellate court held that the suit did not abate on the death of defendant No. 2 Balveer Jain and

therefore, his name be deleted from the array of defendants as the right to sue survives with the plaintiff Sudarshan Lal S/o Shri Bhana Ram.

2. The facts giving rise to the present revision petition in brief are as under :-

The present petitioner Sobhag Narain Mathur filed a suit for specific performance against the defendant Balveer Jain, power of attorney holder of Sudarshan Lal S/o Shri Bhana Ram. The said suit was decreed ex parte on 12.01.1987. Thereafter, the plaintiff Sudarshan Lal filed a suit No. 117/1989 (new No. 44/1993) against the present petitioner Sobhag Narain Mathur, Balveer Jain and UIT, Ajmer for cancellation of the aforesaid ex parte decree dated 12.01.1987. The said suit was rejected by the trial court on 16.04.2004. The plaintiff filed an appeal before the learned District Judge against the said order and during the pendency of the said appeal, the defendant No. 2 Balveer Jain, power of attorney holder of Sudarshan Lal expired. The date of death of the said Balveer Jain has not come on the

record. The appellant Sudarshan Lal filed an application before the appellate court for deleting the name of the respondent No. 2 Balveer Jain on 10.08.2005. As against this, the present petitioner Sobhag Narain Mathur filed an application before the said appellate court in appeal No. 13/2004 that since more than 90 days have elapsed after the death of respondent No. 2 Balveer Jain and the appellant has not taken any steps for bringing legal representatives of the defendant No. 2 Balveer Jain on record, therefore, appeal as a whole has abated and deserves to be dismissed. The said application of the present petitioner Sobhag Narain Mathur has been rejected by the appellate court vide the impugned order dated 13.02.2006 and application of the appellant dated 10.08.2005 was allowed deleting the name of the defendant No. 2 Balveer Jain, the power of attorney holder. Hence, this revision petition by the defendant Sobhag Narain Mathur before this court.

3. Mr. Piyush Nag, learned counsel appearing for the petitioner has contended that the defendant No. 2 Balveer Jain

was a necessary party in the suit, since he was the judgment debtor under the ex parte decree dated 22.01.1987 in the suit filed by the plaintiff Sudarshan Lal seeking cancellation of the said ex parte decree, therefore, with his death, if his LRs are not brought on record, the appeal as a whole abates and therefore, the learned appellate court has erred in rejecting his application vide order dated 13.02.2006. He has relied upon the judgment in the case of ***Satguru Sharan Shrivastava Vs. Dwarka Prasad Mathur (dead) through LRs & Ors.*** reported in AIR 1996 SC 3504. The facts giving rise to the said judgment as noticed by the Hon'ble Supreme Court in para 2 of the judgment were as under :-

> *"The admitted position is that one Dwaraka Prasad mathur was a member of the Secretarial Staff Housing Co-operative Society. Plot No. 14-C was allotted to him as a member and thereon he had constructed a house. It is the case of the petitioner that he had entered into an oral agreement of sale with him to purchase the house for consideration of Rs. 20000/- subject to his obtaining permission for transfer from the Society as per the law. It is his case that he had paid up the amount due from Dwaraka Prasad Mathur to the Society and became member of the Society as per the resolution passed by the Society. But before he got the*

possession, surprise pruned upon him in the form of a decree of specific performance obtained by the second respondent narvedeshwar Prasad Saxena in O.s. No. 77-A of 1976, dated October 11, 1976. So he filed civil suit No. 121-A of 1984, n the plea that both the respondents had played fraud upon him and it was a collusive decree and sought to avoid the decree passed in suit No. 77-A of 1976, (suit No. 121-A of 1984, of the petitioner). Admittedly pending suit both the defendants died. As far as the first defendant is concerned, his widow Shakuntala was brought on record as his legal representative. As regards the second defendant, Prakash Chand Saxena, his son was brought on record as legal representative. He is the decree-holder in the above suit No. 77-A of 1976, and the judgment-debtor is the first defendant. As far as the first defendant is concerned since Shakuntala also died pending suit, the decree as against the judgment-debtor in that suit No. 77-A/76 has become final and no legal representative of her came on record and the suit No. 121-A/84, got abated."

4. As against this, Mr. Mahendra Goyal, learned counsel appearing for the respondent Sudarshan Lal urged that the defendant No. 2 Balveer Jain was only power of attorney holder of the plaintiff Sudarshan Lal, as the ex parte decree dated 12.01.1987 in favour of the present petitioner itself shows and

therefore, with the death of the power of attorney holder Shri Balveer Jain, the right to sue survived with the plaintiff Shri Sudarshan Lal and even in the absence of LRs of the power of attorney holder, the suit filed by the plaintiff Sudarshan Lal seeking cancellation of the ex parte decree against the defendant No. 2 Balveer Jain, who was merely a power of attorney holder of the plaintiff Sudarshan Lal, survived and therefore, the suit could proceed even in the absence of the said Shri Balveer Jain and therefore, the learned appellate court has not erred in rejecting the application filed by the present petitioner and holding that the suit did not abate. He relied upon the full Bench decision of this court in the case of Hardeva Vs. Ismail & Ors. reported in AIR 1970 Rajasthan 167, in which case it was held by the full Bench of this court that where the vendor has sold his property, has delivered the possession of the property to the vendee, the vendee becomes the sole owner of the property and it is upto the vendee to defend his title against any person who claims any right in the property. The vendor may be a proper party but he is not a

necessary party inasmuch as the effectual decree can be passed in favour of third person against the vendee. It would be appropriate to reproduce para 4 of the said judgment :-

> *"4. With great respect, we are of the view that the law laid down by the Division Bench in Poonamchand's case, ILR (1955) 5 Raj. 77 = (AIR 1954 Raj 287), is not sound. When the vendor has sold his property and has delivered the possession of the property to the vendee, the vendee becomes the sole owner of the property and it is upto the vendee to defend his title against any person who claims any right in the property. The vendor may be a proper party, but he is not a necessary party inasmuch as an effectual decree can be passed in favour of third person against the vendee. It cannot be said that the constitution of the suit is bad and no relief can be granted to the plaintiff against the vendee in the absence of vendor. Order 1, Rule 9 lays down that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The injunction of the law is not to dismiss a suit as incompetent if it is possible for a Court of law to proceed with the trial of the suit and determine the rights and interests of the parties actually before it. In a case in which a vendor has lost his right or interest in the property by reason of transfer and all rights, title and interest in the property have vested*

in the vendee, it cannot be said that the suit cannot proceed against the vendee."

Learned counsel for the respondent has also relied upon the judgment of this court in ***Ramrichpal Vs. The Bikaner Stores Supply and Trading Co. & Anr.*** reported in AIR 1966 Rajasthan 187, in which case the learned Single Judge of this court held as under:-

"Where mortgaged money is advanced by firm but the mortgage deed is in favour of one of its partners as a matter of abundant caution and the mortgage suit is substantially raised by the firm and the partner is impleaded as a mere formality, even though the partner dies during the pendency of the appeal it is not necessary, by virtue of O.30, R.4, to join his legal representatives as parties to the suit. Even after the dissolution of a firm, the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution. This is so by virtue of S.47 of the Partnership Act. The firm is, therefore, competent to carry on the suit without impleading the legal representatives of the deceased partner. AIR 1961 Raj. 223, Foll."

5. Learned counsel for the respondent also sought to distinguish the judgment of the Hon'ble Supreme Court in the case of *State of Pubjab Vs. Nathu Ram* reported in AIR 1962 SC 89, which was relied upon by the learned counsel for the petitioner. In the said judgment the Hon'ble Supreme Court held as under :-

> *"Certain land belonging to two brothers L and N jointly was acquired for military purposes and on their refusal to accept the compensation offered by the Collector, the State Govt. referred the matter for inquiry to an arbitrator under R.10 of the Punjab Land Acquisition (Defence of India) Rules, 1943. The arbitrator passed a joint award granting a higher compensation and also certain sum on account of income-tax. The State Govt. appealed against the award to the High Court. During the pendency of appeal L died and as his legal representatives were not brought on record, the appeal abated against him. The question was whether the appeal also abated against N.*
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> *Held that the appeal against N alone could not proceed. To get rid of the joint decree it was essential for the appellant State to implead both the joint decree holders and in the absence of one the appeal was not properly constituted. The subject matter for which the compensation had been awarded was one and the same land and the assessment of compensation, so far as L was concerned having become final, there could*

not be different assessments of compensation for the same parcel of land. The mere record of specific shares of L and N in the revenue records was no guarantee of their correctness and the appellate court would have to determine the share of N & that of L in the land in absence of L's legal representatives which was not permissible in law.

6. Having heard the learned counsels and having carefully gone through the record of the case and the judgments cited at the bar, extracted above, this court is of the opinion that this revision petition has no force and is liable to be dismissed. Both the judgments of the Hon'ble Supreme Court relied upon by the learned counsel for the petitioner are distinguishable inasmuch as in none of the matters before the Apex Court, the question involved was whether on the death of a mere power of attorney holder, the right to sue survives in the principal, the giver. The power of attorney holder merely acts as an agent and binds the principal by his acts. Therefore, admittedly, upon the death of the agent in effect the decree Annex.1 dated 12.01.1987 would have bound the principal Shri Sudarshan Lal, plaintiff in the subsequent suit filed seeking cancellation of the

said ex parte decree dated 12.01.1987. Therefore, the right to sue survived in the said plaintiff. Therefore, his appeal against the rejection of the suit could not be dismissed by the appellate court as having abated on the death of the power of attorney holder Shri Balveer Jain. The full Bench of this court in the 1970, in the aforesaid judgment in the case of *Hardeva Vs. Ismail* (supra) held even in a case of sale of property that it is the vendee who has to defend his title and the vendor may be a proper party but he is not a necessary party in a subsequent suit while challenging his title. Similarly, in the present case, even if the power of attorney holder has died, his absence in the subsequent suit filed for cancellation of the ex parte decree passed against him, which in effect binds the principal, the plaintiff Sudarshan Lal in the present case, such suit can be decided even in the absence of the power of attorney holder Shri Balveer Jain and therefore, there was no question of dismissing the appeal as having abated as a whole on the death of the power of attorney holder Shri Balveer Jain.

7. Consequently, this revision petition is found to be devoid

of merit and the same is accordingly dismissed with no order as to costs.

(Dr.VINEET KOTHARI),J.

Pramod
Item No. 23